UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DONALD T. NETTER

Plaintiff

v. 16 Civ. 8211 (NRB)
Decision

NRT NEW YORK, LLC, d/b/a The Corcoran

Defendants

----------x

New York, N.Y.
November 3, 2016
11:30 a.m.

Before:

HON. NAOMI REICE BUCHWALD

District Judge

APPEARANCES

SMITH GAMBRELL & RUSSELL
Attorney for Plaintiff
DONALD ROSENTHAL

MARGOLIN & PIERCE
Attorney for Defendant
ERROL MARGOLIN

(In open court; case called)

LAW CLERK: Is the plaintiff present and ready to proceed?

MR. ROSENTHAL: Yes.

THE COURT: State your name for the record.

MR. ROSENTHAL: Donald Rosenthal from the law firm of Smith Gambrell & Russell.

LAW CLERK: Is the defendant present and ready to proceed?

MR. MARGOLIN: Yes. My name is Errol Margolin. I'm a partner at Margolin & Pierce.

THE COURT: Fine. Why don't you sit down.

I have a few questions, and thereafter if there is anything anyone wants to say, that's fine. You should know, of course, that I have read your papers and have given this matter some thought.

The first question just concerns the Court's jurisdiction. It is my understanding of the law that the issue of whether Mr. Netter is bound to arbitrate is a decision for the Court, not a decision for the arbitrators.

Anyone disagree with that proposition?

MR. ROSENTHAL: Not I, your Honor.

MR. MARGOLIN: I do, your Honor.

THE COURT: Well, you didn't brief that.

MR. MARGOLIN: Well --

THE COURT: So I would have assumed that since you didn't brief it, that you were not questioning.

MR. MARGOLIN: May I speak to that?

THE COURT: Sure.

MR. MARGOLIN: Your Honor, this arbitration has been pending for at least nine months. Mr. Netter has been a respondent in the arbitration proceeding for nine months. He had every opportunity to bring up the fact that he was not subject to arbitration agreement. He never did. He didn't appear in the proceeding.

There was an entire history to this case. Finally, the arbitrators who had seen enough, this is the fifth court now that Mr. Netter has been involved with, they permitted Corcoran, who was a real estate broker seeking a commission, to file a motion for summary judgment. On the day before the motion for summary judgment, Mr. Netter ran over here to you, your Honor, and filed this complaint to stay the arbitration as to him. Now, Corcoran has advanced the theory which would bind a non-signatory to an arbitration agreement to arbitrate. He could have easily raised that before the arbitrators and chose not to.

THE COURT: But if it is his position that he never agreed to arbitrate, if he did that and asked the arbitrators to rule, that would be contrary to the position that he maintains, and I would argue, would be a waiver of his

position.

Based on what you've said, just to respond, the actions of Mr. Netter in the context of the arbitration seem consistent with the position that he is taking in court. In other words, by not appearing, he is essentially voicing his position that he is not subject to the arbitration, and since arbitration is a creature of contract, and arbitrators don't really quite have the same powers that judges do or courts do in terms of serving summons and complaints on people which require a response, whether or not they're appropriate, while I totally understand Corcoran's position of sort of frustration given that there was the whole state court proceeding which didn't directly involve Corcoran, but of course Corcoran's -- what's the right word -- well, just put it Corcoran's, you know, right to assert its claim to a commission doesn't necessarily arise until the sale has completed.

So I do recognize it is a good sum of money, and I am sure that Corcoran's position is, we did what we were supposed to do under this contract and we deserve to get paid. I assume that's the position that they are asserting before the arbitrators.

MR. MARGOLIN: That is correct.

THE COURT: Right. So, just to be clear, Mr. Margolin, I don't think you are disagreeing with the premise of my jurisdictional question, which is essentially

that typically it is the role of the Court to determine the question in the first instance as to whether someone who is objecting to an arbitration or who is objecting to being hauled before the arbitrators, that that issue is one for a court to decide?

MR. MARGOLIN: I read the cases that were cited. I agree.

THE COURT: All right.

Now, the other big picture preliminary question is, I think I understand the strategic reason that this case was commenced by an application for a preliminary injunction, but I don't really see a distinction between the issue raised on the current motion and the full case on the merits. So my question to both parties is, is there something I'm missing or is this an appropriate case to consolidate the merits with the preliminary injunction motion?

MR. ROSENTHAL: Yes, your Honor. We see no meaningful distinction between the motion and the underlying proceeding application for a stay. It's one and the same.

THE COURT: Mr. Margolin.

MR. MARGOLIN: I'm not sure I understand the question. Are you saying consolidate the arbitration with --

THE COURT: No, not at all.

MR. MARGOLIN: OK.

THE COURT: Let me say it and quote a Federal Rule as

I do. So Rule 65 on injunctions and restraining orders, Rule 65(a)(2) which bears the title Consolidating the Hearing with the Trial on the Merits.

MR. MARGOLIN: I understand.

THE COURT: OK?

MR. MARGOLIN: I got it.

THE COURT: All right. So the question is, this provision requires that the Court give notice to the parties or the concept of joinder and consolidation and my -- and to go back and ask my question again, I don't see a distinction between the issues in these motion papers and some ultimate issue on the merits. They seem to me to be one and the same, and my question to you is, do you disagree. And if you do, what is it that I am missing? In other words, why can't we resolve this now?

MR. MARGOLIN: Well, I think the issue for me is that we have asserted facts upon information and belief, I will concede, that The Ann has transferred -- it was a single asset company. It transferred its sole property, and it transferred all of the assets to Mr. Netter, and that this perpetuates a fraud on Corcoran. We would have to have a hearing, or I would suggest to the Court that the merits of that position have not been presented to you. Nowhere in the moving papers do I see a statement, a bank account or anything that The Ann Holdings has sufficient assets to satisfy an award which is rendered in the

arbitration proceeding. And I understand, you know, we want to preserve the status quo and what the standards are for injunctive relief, but I think all motions must be considered on the merits, and I don't see any merits that The Ann Holdings has sufficient assets.

The Ann Holdings is a South Dakota corporation. It had one asset. It is, as I have said in my papers, one and the same with Mr. Netter, and for him to hide behind this LLC and we get an award and then go to South Dakota and find out later that there are no assets -- it's not like J.C. Penney Company, which is an ongoing business, and we're trying to make the president of the J.C. Penney Company liable for the debts of J.C. Penney Company.

Here, we have a single asset company sold its assets. I see an affidavit from a lawyer saying, oh yes, we gave all the money to The Ann Holdings, but that was two years ago. What happened to the money since then? I have asked repeatedly -- I said, I'll let him out if you demonstrate to me that The Ann has sufficient assets to satisfy an award. That request has never been met.

THE COURT: Well, don't you have two problems?

MR. MARGOLIN: Yes.

THE COURT: One might be just called putting the cart before the horse. And by that I mean are you not prematurely -- you do not actually have a judgment against Ann

Holdings.

MR. MARGOLIN: I do not.

THE COURT: Right. And, listen, I am not unsympathetic to a concern about collectibility in any situation, but unless you commenced and succeeded on bringing an action under the CPLR for prejudgment attachment, which you have not done, I don't think you get to have security for your judgment before you obtain a judgment; and I don't disagree with you that if you did have a judgment, and after your arbitration, you translated -- confirmed the award and obtained a court judgment, that you could register that judgment under the Full Faith and Credit Clause in South Dakota and proceed to try to collect it, and you could certainly as part of your supplementary proceedings depose Mr. Netter, the proper, you know, spokesperson and you could find out what happened. And if in fact it turns out -- because this is all an assumption that he will not -- that if Corcoran gets a judgment, it will not be paid. And if the scenario turns out as you think it will, then you have, I would think, a good claim for piercing the corporate veil as part of your judgment collection.

MR. MARGOLIN: But I've alleged that in the arbitration. I've alleged facts sufficient to state a cause of action for piercing the corporate veil in the arbitration. Mr. Netter has not responded. I said, upon information and belief that The Ann transferred the money to Mr. Netter. I

don't know whether that's true or not.

THE COURT: Then you have a forum if the arbitrators believe, you know, contrary to my analysis, that it's too early to raise that issue, but they could disagree, and they aren't necessarily bound to the same sort of constraints that I am, and then they decide that you're right and that Ann Holdings doesn't give the arbitrators the response that they are looking for --

MR. MARGOLIN: See, the last communication I got from the arbitrators was that they were waiting on you to determine whether --

THE COURT: OK. Well, I'm happy to resolve this today.

MR. MARGOLIN: I see.

THE COURT: I mean, look, let's assume for argument's sake that Mr. Netter took the proceeds of the sale out of Ann Holdings, is there is nothing that prevents him from putting money back in Ann Holdings because presumably for tax reasons he would want Ann Holdings to pay the commission because that is the way it would then reduce the profit on the sale. I'm assuming a profit. New York real estate being what it is, I'm assuming he made money.

If he did, you know, you want to reduce the capital gain. I would think that's how he would do it. But listen, this is far higher finance than people who make their money off

of a salary get involved in. The point is there really is no evidence that there really has been a fraud committed. I think just intellectually it's too early to figure that out.

I think those are my questions. I'm happy to hear anything else. Mr. Rosenthal is being smart and keeping quiet. I'm doing a good job for him. He's learned that basic litigation lesson: Don't talk when you're ahead.

MR. MARGOLIN: The only thing I would suggest to the Court, having read Rule 65, is that at the very minimum, Mr. Netter should have to post a bond to secure whatever judgment we get against Ann Holdings in order to be entitled to --

THE COURT: That's like winning.

MR. MARGOLIN: No.

THE COURT: I mean, the point is you don't have the basis to get prejudgment attachment. You haven't sought it, and while I didn't go back yesterday and I probably should have, looked at the New York CPLR section on that, I've dealt with it in a few other cases, and I don't think you could get a prejudgment attachment. If you can't, then you can't back door this preliminary injunction which simply is designed to establish that Mr. Netter did not voluntarily or contractually, I should say, agree to arbitrate. But that is not the same thing as opening him up to a bond. Whether or not he arbitrates is really not -- I mean, it doesn't really involve

the collectibility issue because even if you have a judgment, you still have to collect it. And you just have one more step here essentially.

Anybody else want to say anything?

MR. ROSENTHAL: I have been very quiet, your Honor, for the reasons that you wisely suggested, so I am going to continue in that vein. If there is anything in particular that's troubling the Court that you would like me to address, I'm happy to do it, but I think you have hit on the same concerns that we have had, so I will leave it there.

THE COURT: As I said, and it's going to be very obvious because I'm going to read a decision into the record, and we really did research this and think about it a good deal.

First, based on the record submitted on the motion, and given our discussion at oral argument, I am going to consolidate the preliminary injunction hearing with the merits pursuant to Federal Rule of Civil Procedure 65(a)(2) and grant plaintiff's request for a permanent injunction.

A permanent injunction is warranted where the moving party establishes: "(1) Success on the merits; (2) The lack of an adequate remedy at law; and (3) Irreparable harm if relief is not granted.

I cite for that proposition *UBS Securities v. Voegeli,* 405 F. App'x 550, 551 (2d Cir. 2011). It's a summary order citing *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006). Under

the Circuit's precedent being forced to arbitrate a claim one did not agree to arbitrate constitutes an irreparable harm for which there is no adequate remedy.

Voegeli, 405 F. App'x at 552 citing *Merrill Lynch Investors Managers v. Optibase Ltd.*, 337 F.3d 125 at 129 (2d Cir. 2003), a per curiam opinion. Therefore, the only issue in this case is whether plaintiff succeeds on the merits of his claim; i.e., whether Netter is a proper party to the arbitration pending between NRT New York, LLC, doing business as The Corcoran Group (hereafter Corcoran) and The Ann Holdings LLC, formerly known as Cricket LLC (hereafter The LLC).

It is well settled that "Unless the parties clearly and provide otherwise, the question of whether the parties agree to arbitrate is to be decided by the Court, not the arbitrator." *John Hancock Life Ins. Co., v. Wilson*, 254 F.3d 48, 53 (2d Cir. 2001). The question of whether a party is bound to an agreement to arbitrate in turn is governed by ordinary principles of state contract law. *First Options of Chicago, Inc., v. Kaplan*, 514 U.S. 938, 944 (1955). In this case the parties do not dispute that New York law governs.

The June 3, 2010 agreement entered into between The LLC and Corcoran (hereafter referred to as The Agreement) requires arbitration of all disputes arising under its terms and is the subject of the arbitration currently pending between Corcoran and The LLC. There is no dispute that Netter signed

the agreement solely in his capacity as representative The LLC which is insufficient to personally bind Netter to the agreement. See e.g. *Bonnant v. Merrill Lynch, Pierce, Fenner & Smith, Inc.* 467 Fed App'x 4, 10 (2d Cir. 2012). Corcoran argues that Netter may nevertheless be bound under a veil-piercing theory.

Defendants are correct that in some circumstances non-signatories may be bound to an arbitration agreement under a veil-piercing theory. See *Thomson-CSF, SA. v. American Arbitration Association*, 64 F.3d 773, 776 (2d Cir. 1995). However, under New York Law, the proponent of the veil-piercing theory must establish that: (1) the owner exercised complete domination of the corporation in respect to the transaction attacked, and (2) that such domination was used to commit a wrong or fraud against the plaintiff which resulted in plaintiff's injury. *Morris v. New York State Department of Taxation and Finance*, 82 N.Y.2d 135, 141, a parallel cite at 623 N.E. 2d 1157 (1993).

Defendant's reliance on a veil-piercing theory at this time is misplaced and premature. While there is evidence that Netter has exercised complete domination of The LLC with respect to the transaction at issue, defendants cannot establish that any such domination was used to commit a wrong or fraud against Corcoran which resulted in Corcoran's injury.

There is no evidence that The LLC has not retained the

proceeds of the sale of the condominium at issue, or whether The LLC has insufficient assets to satisfy an arbitral or judgment against it. More fundamentally, Corcoran has not suffered any injury resulting from Netter's alleged domination of The LLC.

Indeed, Corcoran will not suffer an injury unless and until The LLC fails to satisfy an arbitral award. In the absence of such an injury Corcoran's attempt to invoke a veil-piercing theory is premature. The fact that Corcoran must first in its word "chase The LLC," which is incorporated in South Dakota, does not constitute a fraud or wrong and does not warrant disregarding The LLC's corporate forum. Accordingly, it is ordered that plaintiff is granted a permanent injunction staying the arbitration proceedings against Netter.

We will issue something on the docket sheet to reflect this.

MR. ROSENTHAL: Thank you very much, your Honor.

THE COURT: Very good. Thank you.

MR. MARGOLIN: Thank you, your Honor.

(Adjourned)